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Sent via email

Re: Comments on Groundwater Sustainability Plan Emergency Regulations

This letter provides comments on the Sustainable Groundwater Management Act Draft Emergency Regulations for Groundwater Sustainability Plans and Alternatives, released by the Department of Water Resources (DWR) on February 18, 2016. The letter highlights specific draft regulations needing clarification, technical correction, or further substantive development. It also points out areas in which the draft regulations can improve its guidance to counties and local agencies as they develop groundwater sustainability agencies (GSAs) and develop groundwater sustainability plans (GSPs).

Introduction

DWR's introduction appropriately emphasizes "local control and management" as a fundamental SGMA principle, and notes that "the draft regulations preserve the role of local agencies in managing their basins and achieving sustainability." However, the introduction does not directly mention the existing authority of cities and counties to manage groundwater. It should be revised to reference the Legislature's findings in enacting "recognize and preserve the authority of cities and counties to manage groundwater pursuant to their police powers." (SGMA, Uncodified Findings, § 1(B)(5). SGMA's relationship to this existing authority is addressed in greater detail in the attached comments of Kern County Counsel, dated June 1, 2015, addressing DWR's draft strategic plan for its groundwater sustainability program.

Similarly, the draft introduction does not specifically discuss county land use authority. It should be revised to note that the regulations must be consistent with Water Code section 107268(f), which ensures that plans under SGMA shall not be construed to supersede "the land use authority of cities and counties, including the city or county general plan, within the overlying basin." DWR's Topical Paper 3 provides useful background on this requirement.

Finally, the introduction should also mention that in enacting SGMA, the Legislature recognized that local agencies must "have the necessary support and authority

to manage groundwater sustainably.” (SGMA, Uncodified Findings, § 1(A)(8).) As DWR develops the final version of the proposed regulations, it should keep in mind the importance under SGMA of providing this crucial support and authority.

General Comments

The County believes the proposed draft emergency regulations should be a working document, in that it should allow for modifications, clarifications, changes, or correction beyond this comment period. As the involved entities move forward in the preparation of their GSP’s, unknown or new techniques and situations may occur. Allowing for future modifications could positively impact the goals of GSP’s and the statewide aim to have sustainable groundwater management at the local level.

The County believes that multiple GSP’s within a designated groundwater basin should be allowed as provided for in Water Code Section 10727. However, each GSP should not be responsible for reaching sustainability for the entire basin. Each GSA and its Plan should not have to duplicate the same message of basin description, water budget, geology, basin conditions, monitoring network or interbasin agreements. An agreement or the creation of a coordination agency (as described in § 351. Definitions (g)) between multiple GSP’s within a basin should be allowed for the coordination of the plans to achieve their sustainability goal and the goal of the basin.

General Principles (Article I)

Section 350.2(a) refers to achievement of the sustainability goals for the “entire basin.” To avoid potentially conflicting or redundant actions, this provision, which recognizes the need for statutory goals to be met throughout the basin, needs to be harmonized with section 10727(b)(3), which allows multiple GSAs to proceed under a basin-wide coordination agreement, and section 10735.2(e), which excludes from probationary status portions of a basin meeting the sustainability goal.

The reference to the information gathering and reporting process in section 350.2(b) needs an understandable benchmark for identifying “sufficient reliable information” for DWR to evaluate a plan’s adequacy.

The general principles allow DWR to find an initial plan adequate despite deficiencies where “sufficient credible information” supports “reasonable interpretations about basin conditions.” Section 350.2(d). This provision needs further clarification about what these terms mean and how the burden of proof operates.

Section 350.2(f)’s general statement that DWR may evaluate a plan “at any time” needs to be clarified. It is unclear, how, if at all, this open schedule is to be reconciled with the descriptions elsewhere of DWR’s review of local plans (see, e.g., section 355.6).

Definitions (Article II)

“Baseline,” in section 351(e), refers to “historic information used to project future conditions for hydrology, water demand, and availability of surface water and to evaluate

potential sustainable management practices of a basin.” This definition needs to be reconciled with the provision on water budgets in section 354.18, which applies a more nuanced and detailed approach in evaluating these conditions.

“Critical parameter,” in section 351(e), suffers from confusing diction. This definition does not clearly describe an identifiable condition, and imprecisely paraphrases six different types of “undesirable results” from Water Code section 10721(x) within a single sentence. It would be clearer to define “critical parameter” as “a condition that, if worsened, produces one or more the effects defined as ‘undesirable results’ in Water Code section 10721(x).”

“Coordinating agency” in section 350(i) is defined as being the “sole” point of contact with DWR, which could impair communication with other agencies and in some cases, hinder dispute resolution. If this concept is retained, the definition should not make this agency the exclusive point of contact.

“Interested parties,” in section 351(l), refers to the GSA’s list of persons established under Water Code section 10723.4. To ensure consistency with the second sentence of that section, this definition should also mention that any person may make a written request to be included on this list.

“Interconnected surface water,” in section 351(m), “refers to conditions where surface water and the underlying aquifer are hydraulically connected by a continuous saturated zone and the overlying surface water is not completely depleted.” The meaning of “continuous saturated zone” in this definition needs further clarification.

“Plan manager” in 351(w) should read as follows: “an employee or authorized representative of a groundwater sustainability agency *or agencies* who has been delegated management authority *by its respective governing body* for submitting the groundwater sustainability plan and serving as the point of contact between the groundwater sustainability agency *agencies, the land use planning authority for the agency or agencies* and the Department.”

Section 351 (af) should read: “Water source type represents the source from which water is derived to meet the applied beneficial uses, including, but not limited to, groundwater, *banked groundwater*, recycled water, reused water, *local precipitation* and local or imported surface water sources identified as Central Valley Project, the State Water Project, the Colorado River Project, local supplies, and local imported supplies.”

“Water supply reliability,” in section 351(af), “refers to the likelihood that the supply of water within the basin will satisfy reasonable demands for the beneficial uses and users of water,” but does not clarify what such terms as “likelihood” and “reasonable demands” mean. This definition needs be clarified and harmonized with DWR’s use of the term in other settings (e.g., Bulletin 118 updates and State Water Project reliability reports), which also provide more guidance on the factors affecting reliability.

“Substantial compliance” should be defined in Article 2. Further discussion is provided below.

Technical and Reporting Standards (Article 3)

Section 352.4(a) requires a GSA to adopt best management practices, but then inconsistently suggests that a GSA “may” rely on DWR’s best management practices or “shall” adopt their own. The second sentence should be revised to clarify that the GSA may either utilize DWR’s best management practices, or adopt its own practices of equal or greater rigor.

Section 352.6(b)(3) Should read: “Wells used to monitor groundwater conditions shall be constructed according to standards described in the local jurisdictional authority’s well construction standards or ordinance, as long as such standards meet or exceed those of DWR Bulletin 74-90, as amended, and shall include the following identifying information presented in both tabular and geodatabase compatible shapefile form:”

The reference to an “initial” plan in section 352.6(b)(4) is confusing, and needs to be clarified or eliminated.

Section 352.6(e) has a typo in the requirements for water models. It should say “shall consist,” not “shall be consist.”

Section 352.6(f) incorrectly cites section 355.12 as the provision addressing DWR’s resolution of inter-basin disputes. These are addressed in section 355.10(b).

DWR needs to provide further guidance to local agencies on identifying reports not “generally available” under section 352.6(f), and assist in establishing a feasible method of providing them electronically. This section also needs to clarify whether GSAs have the option of disclosing proprietary data that “need not” be disclosed under this section.

DWR should provide GSAs additional guidance and assistance on the development, implementation and financing of a coordinated data management system, as required of a GSA under section 352.8.

Procedures (Article 4)

Section 353.8, which allows any person to comment on a proposed or adopted plan, only specifies that comments are to be provided “to the Department.” This section should be revised to ensure that any comments are also provided to the local GSA.

Under section 353.8(e), DWR is “not required to respond to comments,” but is supposed to consider them. It is unclear why DWR believes responses aren’t needed or useful. At least for substantial comments potentially affecting the fulfillment of statutory objectives, obtaining written guidance from DWR would be appear to useful--and would assist GSAs in ensuring that applicable requirements are met, and that problems can be addressed before DWR reaches the plan evaluation stage.

DWR must give the GSA a “reasonable opportunity” to respond to public comments under section 353.8(f). This provision leaves vague, and needs further clarification, of what constitutes a “reasonable” opportunity.

Section 353.10 provides that a GSA may withdraw a plan at any time upon notice to the Department, and may amend a plan at any time “pursuant to the requirements of section 356.12.” Although DWR must evaluate amendments for consistency with SGMA’s requirements (section 356.12), the regulations leave unclear and need to clarify whether plan withdrawals under Water Code section 10723.8(e) also receive DWR’s review.

Plan Contents (Article 5)

Section 354.6 requires the GSA to provide “information demonstrating that the Agency has the necessary legal authority to implement the plan,” but provides little guidance on the type of information sought. To avoid an amorphous and time-consuming legal briefing burden on the local agency, this section should be revised to clarify the specific information expected, and should operate consistently with the underlying SGMA provision (Water Code section 10723.8). Any information on financing must be readily understandable by GSAs, tied to statutory requirements, and feasible for GSAs to provide without imposing prohibitive costs.

The description of the plan area (section 354.8) must include descriptions of existing plans and programs. To avoid conflicts with the authority of counties preserved in SGMA, this section should clarify that GSP implementation is not meant to usurp constitutional police power and land use authority.

Section 354.8(a)(2) should read: “Jurisdictional boundaries of federal land, state land, tribal land, cities and counties and other land use agencies, and all city or county adopted general plans within the Plan area.”

Section 354.8(g)(1) “A summary of land use plans governing the basin...” If multiple agencies are formed within a basin, then the overall basin development plan could be summarized using all general plans available for the basin.

Section 354(g)(2-7). These sections require a land use change analysis for the entire basin. In a basin that may have multiple GSA’s, the individual GSA’s should not have to analyze over other GSA’s in the same basin. Such basin analysis should be addressed in any coordination agreements for the GSA’s within a single basin.

Section 354.8(g)(8) requires a description of how existing land use plans outside the basin may affect the GSA’s achievement of sustainable management for “any area” the agency determines to be “linked to the hydrology” of the basin governed by the plan. This provision should clarify whether this refers only to areas within a member agency’s jurisdiction.

Section 354.10(b) requires plans to describe the interests of “beneficial uses and users” in the basin. These terms need to be used consistently in the regulations, with a more precise definition of qualifying uses and users.

Section 354.10(d) requires plans to include a copy of all comments received by the agency and a summary of any GSA responses. Since DWR must already receive copies of comments, it is unclear why the GSA must submit an additional copy.

Section 354.14 should be reviewed to ensure it is technically feasible for GSAs and to clarify that it is not intended to supersede local decision-makers' exercise of land use authority.

Section 354.16's description of basin conditions needs to be harmonized with the baseline definition and the analysis required for the water budget (section 354.18). This section says that the plan shall characterize "current and historical" groundwater conditions, but should be clearer that analysis is needed of current (existing) conditions as well as baseline and historic conditions. . Each GSA in a multiple GSA basin should not have to characterize the entire basin in its GSP. This is an example where this topic could be addressed in a coordinating agreement for the basin as a whole would be less cumbersome and repetitive.

Section 354.18 includes a confusing reference to "central valley land use," included in the list of DWR-furnished information that GSAs should use in developing a water budget. This section needs to either explain this reference, or correct it if it is in error. We also suggest the following: "...and the change in the amount of groundwater stored in storage. Water budget information..."

Section 354.18(b) requires plans to quantify a current, historical, and projected water budget for the basin. This section would benefit from greater precision in explaining what counts as "demand" in this quantification. As in the definition section, this section would also benefit from a clearer definition of water supply reliability.

Section 354.18(c). We suggest the following: "The Plan shall rely on the best available information and best available science to quantify the water budget for the ~~basin~~ Plan area in order to provide an adequate understanding of historical
.....groundwater flow."

Section 354.18 (e). We suggest the following: "The Department shall provide the California Central Valley Groundwater Surface Water Simulation Model (C2VSIM) and the Integrated Water Flow Model (IWFM) for use by Agencies in developing the water budget. Each Agency may choose to use a different flow model upon the approval of such different model by the Department."

Section 354.22 uses the term "critical parameter." The need for a clearer understanding of this term is discussed in the definition section 351(e).

Section 354.28 requires a GSA to show the representative minimum threshold is supported by "clear and convincing" evidence. It is unclear what this means in context, or why this should be used as the operative standard, rather than substantial evidence.

Section 354.32's description of the monitoring network indicates that it "shall promote" collection of sufficient data. It should be revised to require that the network shall "provide" the specified data collection.

Section 354.34. We suggest: "Each Agency shall develop a monitoring network capable of collecting sufficient data to demonstrate short term, seasonal, and long term trends in surface and groundwater conditions and yields representative information about changes relative to the minimum thresholds and measureable objectives for ~~the basin~~ its Plan area."

Section 354.34(b) describes the monitoring network's required coverage of critical parameters. It should be revised to specify that the network "shall ensure" adequate coverage, instead of the more indirect "shall be designed to ensure...."

Section 354.38(d) refers to monitoring adjustments required of a GSA under certain conditions. The list of four conditions is not grammatically consistent and needs revision to avoid confusion.

Section 354.40 addresses plan requirements for projects and management actions. It should specify whether data provided to DWR shall be publicly available.

Section 354.44(b)(2) should indicate whether the "emergency contingency projects" described are subject to CEQA compliance, or anticipated to be covered by a CEQA exception.

Section 354.44 requires each GSP to include contingency projects or management actions that will be implemented if measurable objectives have not been met. This provision needs to identify more clearly the circumstances warranting use of these approaches. GSAs should have an opportunity to identify circumstances, if any, in which contingency projects would be infeasible or inconsistent with statutory requirements.

Section 355.4(a)(3)'s requirement that a plan cover an entire basin should clarify that multiple plans can cover a single basin, where the plans are addressed in a valid coordination agreement.

Section 358.4 (c)(2)(C) refers to a local agency submitting an alternative based on an adjudication, but the Water Code reference (section 10733.6(b)(4)(B)) is incorrect. The correct reference appears to be section 10733.6(b)(2).

Evaluation and Assessment (Article 6)

DWR references a criterion of "substantial compliance" (section 355.4), which essentially allows DWR to determine that despite discrepancies, the plan shows good-faith attempts to comply, provide "sufficiently thorough and reasonable" analysis, and would not "materially affect" the achievement of sustainability goals. The meaning of "substantial" compliance, and the scope of DWR's discretion to allow exceptions, would benefit from further clarification.

GSA's would benefit from greater clarity in DWR's explanation of its evaluation criteria in section 355.4(b)—for example, “quality” in (b)(2), “reasonable” in (b)(3), “adequately” in (b)(4), “adversely” in (b)(6) and “same data and methodologies” in (b)(7). As noted above, the reference to “beneficial uses and users” in (b)(4) needs to be consistently and clearly defined for both uses and users.

Section 355.4(a)(3) indicates an initial plan will be deemed inadequate if it does not cover the “entire basin.” This standard needs clarification: is it satisfied by “substantial compliance?”

The reference to a GSA's “legal authority” in section 355.4(b)(7) needs to be clarified and reconciled with the statutory preference for local solutions.

DWR's procedures for conflict resolution (section 355.10) need to be reviewed for consistency with Article 8. DWR should first attempt to resolve disputes on fundamental issues before deeming the plan and alternatives inadequate.

Reports, Assessments and Amendments (Article 7)

Section 356.10, which addresses periodic plan evaluation, should specify if further the evaluation is required when changes occur in the GSA's membership.

Section 356.12, which described DWR's evaluation, should substitute the word “finds” for the more opaque phrase “reason to believe.”

Coordination Agreements (Article 8)

Under section 357.2, GSPs must avoid interference with an adjacent basin's ability to implement their GSP and achieve their sustainability goals. This provision should clarify how to proceed when efforts at inter-basin coordination fail to produce an agreement, or result in an agreement failing to meet the regulatory criteria.

In section 357.4 several phrases remain vague and would benefit from clearer description. These include “same data and methodologies,” “consistent interpretations,” and “legally binding.”

Section 357.4 addresses intra-basin coordination, but provides little guidance on how it operates in practice. This provision would benefit from greater specificity, drawing on DWR's scoping review and topical paper (See www.water.ca.gov/groundwater/sgm/pdfs/SGMA_GSP_Topic-6_Intra-and-Inter_Basin_Coordination_080315.pdf.)

Respectfully submitted,



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